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CASE NO. 91-1827

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1991

JOAN FRANCES BLANKMANN

and PATRICK OMAR BOHAN,

Petitioners,

v.

CARLTON WILLARD SARGENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF
THE STATE OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN CASE BY OTHER COURTS. v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI 6

1. PETITIONERS WAIVED THEIR RIGHT TO ASSERT THIS CONSTITUTIONAL QUESTION ON APPEAL 6

2. O.C.G.A. § 34-9-11 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 8

CONCLUSION. 18

TABLE OF AUTHORITIES

Official Code of Georgia
Annotated (O.C.G.A.)
§ 34-9-11 . . . 2, 3, 6, 8, 11, 12, 17

Cases:

Estabrook v. American
Hoist and Derrick, Inc.,
498 A.2d 741 (1985) 13

Williams v. Byrd, 242 Ga. 80,
247 S.E.2d 874 (1978) . . . 2, 8, 9, 12

Long v. Marvin M. Black Co.,
250 Ga. 621, 300 S.E.2d 150
(1983) 2

Sugarman v. United States,
249 U.S. 182, 39 S.Ct. 191,
63 L.Ed. 550 (1919) 5, 14

Wilcoxon v. Aldredge,
192 Ga. 634, 155 S.E.2d 873
(1941) 6

Renfroe v. Wallace,
214 Ga. 685, 107 S.E.2d 225
(1959) 7

Howard v. State,
185 Ga. App. 465, 364 S.E.2d 600
(1988) 7

Frashier v. State,
217 Ga. 593, 124 S.E.2d 279
(1962) 7

Herndon v. Georgia,
295 U.S. 441, 55 S.Ct. 794,
79 L.Ed. 1530 (1935) 7

Saala v. McFarland,
41 Cal. Rptr. 430 (1964) 9, 11

O'Brien v. Rautenbush,
139 N.E.2d 222 (Ill. 1957) . . . 9

Smith v. Gould, Inc.,
918 F.2d 1361 (8th Cir. 1990) . . 9

Suckow v. NEOWA, F.S., Inc.,
445 N.W.2d 776 (Iowa 1989) . . . 9

Davidson v Hobart, 643 F.2d
1386 (10th Cir. 1981) 9

Perez v. Continental Casualty
Co., 367 So.2d 1284 (Ga. App.),
cert. denied, 369 So.2d 157
(La. 1979) 9

Mills v. Reynolds, 807 P.2d 383
(Wyo. 1991) 9

Crowell v. Benson, 285 U.S. 22,
52 S.Ct. 285 (1932) 14

Massey v. Thiokol Chemical
Corp., 368 F.Supp. 668
(S.D.Ga. 1973) 15, 17

Dandridge v. Williams,
397 U.S. 471, 90 S.Ct. 1153,
25 L.Ed.2d 491 (1969). 16, 17

Zucht v. King,
260 U.S. 174, 43 S.Ct. 24,
67 L.Ed. 194 (1922) 13, 14

Miscellaneous:

Larson, Workers' Compensation
Law, Volume 2A, § 72.20 9

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED ON CASE BY OTHER COURTS

1. Carlton Willard Sargent v. Joan Frances Blankmann and Patrick Omar Bohan, 202 Ga. App. 156 (1991).

2. Sargent v. Blankmann, A91A1903 (Ga. App. Nov. 19, 1991).

STATEMENT OF THE CASE

This action arises out of a vehicular collision, (hereinafter "the collision"), involving a passenger car owned and operated by respondent Carlton Willard Sargent, (hereinafter "respondent"). At the time of the collision, Gunar Naib Bohan, (hereinafter "Bohan"), was a passenger in respondent's vehicle. Approximately one week after the collision, Bohan died.

Petitioners Joan Frances Blankmann and Patrick Omar Bohan, (hereinafter "petitioners'), are the surviving heirs of Bohan. The petitioners filed this tort action to recover damages against respondent. They allege wrongful death. The respondent contends that Bohan's death was unrelated to injuries sustained in the collision.

At the trial level, respondent filed a motion for summary judgment pursuant to the exclusivity provision of the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-11. O.C.G.A. § 34-9-11 precludes an employee or, as in this case, her surviving heirs, from maintaining a tort action against a co-employee where the employer provides workers' compensation benefits to its employees and the injury to the employee "arises out of and in connection with the employment." O.C.G.A. § 34-9-11(a); Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978); Long v. Marvin M. Black, Co., 250 Ga. 621, 300 S.E.2d 150 (1983).

In the present action, the trial court denied respondent's motion for summary judgment, but granted him permission to seek interlocutory review.

On appeal, the Georgia Court of Appeals reversed the trial court's denial and granted respondent's motion for summary judgment on the following undisputed facts: (1) respondent and Bohan were co-employees; (2) their employer provided a plan for workers' compensation benefits; and (3) the injuries allegedly sustained by Bohan "arose out of and in connection" with her employment. Based on these undisputed facts, the Georgia Court of Appeals determined that O.C.G.A. § 34-9-11 barred the petitioners from maintaining their tort action against respondent.

The petitioners applied for writ of certiorari to the Georgia Supreme Court. At that time, petitioners first raised their contention that O.C.G.A. § 34-9-11 violated their equal protection rights.

On January 30, 1992, the Georgia Supreme Court denied the petition for writ of certiorari.

In their petition for writ of certiorari to this Court, petitioners have presented the following issue for review:

> Whether the scope of immunity created by the exclusive remedy of Georgia's Workers' Compensation law and as applied to Petitioners' cause of action is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States (Petition for Writ of Certiorari, Question for Review, i)

SUMMARY OF ARGUMENT

Petitioners' petition should be denied for two reasons. First, the petitioners' failed to raise this constitutional question at the trial level, thereby waiving this defense. Alternatively, the petition fails to demonstrate that the constitutional question presented is "substantial in character." Sugarman v. United States, 249 U.S. 182, 184, 39 S.Ct. 191, 63 L.Ed. 550 (1919). For these separate reasons, respondent respectfully requests that this Court deny this petition for writ of certiorari.

ARGUMENT FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI

1. Petitioners waived their right to assert this constitutional question on appeal.

At no time prior to the petition for writ of certiorari to the Georgia Supreme Court did the petitioners contest the constitutionality of O.C.G.A. § 34-9-11. At both the trial level and before the Georgia Court of Appeals, the petitioners failed to assert their equal protection rights.

When the issue was raised to the Georgia Supreme Court, it was too late to be considered. In Wilcoxon v. Aldredge, 192 Ga. 634, 637, 155 S.E.2d 873 (1941), the Georgia Supreme Court held that "it is well-settled that constitutional questions may be waived by failure to

comply with reasonable procedural requirements." Such requirements demand prompt assertions framing the constitutionality of a statute. Renfroe v. Wallace, 214 Ga. 685, 686, 107 S.E.2d 225 (1959). The Georgia Court of Appeals has held that a constitutional question cannot be raised for the first time on appeal, Howard v. State, 185 Ga. App. 465, 364 S.E.2d 600 (1988).

Since the petitioners failed to raise the present constitutional question prior to appeal, the petitioners waived their right to subsequently assert this issue. Howard v. State, supra; Frashier v. State, 217 Ga. 593, 124 S.E.2d. 279 (1962).

In Herndon v. Georgia, 295 U.S. 441, 441-42, 55 S.Ct. 794, 79 L.Ed. 1530 (1935), this Court held that a

constitutional issue was waived by the petitioner's failure to properly except to an adverse ruling by the trial court. Since the lower court was not given the opportunity to resolve this issue, it was not properly before the highest court. For this reason, the petition for writ of certiorari now before the court should be denied.

2. O.C.G.A. § 34-9-11 does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The issue presently before the Court has previously been decided by the Georgia Supreme Court. In Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978), the court upheld the constitutionality of O.C.G.A. § 34-9-11, barring an employee's action for negligence against a fellow

employee. Id. 242 Ga. at 81; see also, 2A Larson, Workers' Compensation Law § 72.20 (1976).

Numerous other jurisdictions have also upheld the integrity of similar statutes coming under constitutional attack on equal protection grounds. Saala v. McFarland, 41 Cal.Rptr. 530 (1964); O'Brien v. Rautenbush, 139 N.E.2d 222 (Ill. 1957); Smith v. Gould, Inc., 918 F.2d 1361 (8th Cir. 1990); Suckow v. NEOWA, F.S., Inc., 445 N.W.2d 776 (Iowa 1989); Davidson v. Hobart, 643 F.2d 1386 (10th Cir. 1981); Perez v. Continental Casualty Co., 367 So.2d 1284 (La.App.) cert. denied, 369 So.2d 157 (La. 1979); Mills v. Reynolds, 807 P.2d 383 (Wyo. 1991).

In Saala v. McFarland, supra, the appellant-employee contested the

California Workers' Compensation law, (section 3601), which barred her negligence action against a co-employee for a work related injury. The employee contended that the California statute violated her equal protection rights provided by the Fourteenth Amendment to the United States Constitution. The California court denied the appellant-employee's appeal, holding that the:

> . . ., appellant is not denied equal protection of the laws by section 3601 as we have construed it. Equal protection of the law simply means that all persons of a given class enjoy the same protection of the law as is enjoyed by other persons or classes of persons under like circumstances. (16

> Am. Jur.2d 848 and cases cited.) Here the statute in question bears equally upon appellant and all who are similarly situated and hence satisfies the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Saala v. McFarland, 41 Cal.Rptr. at 536.

O.C.G.A. § 34-9-11, at issue here, also bears equally upon petitioners and all who are surviving heirs of an employee, who sustains a work related injury by the alleged negligence of a co-employee. The Georgia Workers' Compensation law has created a class of individuals consisting of employees, spouses of employees, and all heirs and successors of an employee injured by a

co-employee on the job. This class of individuals has recourse against the workmen's compensation fund. This class also has recourse against third party tortfeasors, but not employees of the same employer. O.C.G.A. § 34-9-11. According to Georgia law, individuals within this class are treated equally under the law. Williams v. Byrd, supra.

The petitioners have failed to make even a preliminary showing that individuals within the subject class are treated unequally. Rather, petitioners have compared individuals within this class to all other victims of an alleged tort. These are separate and distinct classes. The subject statute does not purport to address all claimants. Rather, it carves out a specific group of

claimants and provides a uniform right of recourse for each member of the class.

The petitioners have moved this Court to accept jurisdiction based on their perception that there exists a wide variance among jurisdictions in the application of workers' compensation statutes. In support, the petitioners cite to one jurisdiction where a similar workers' compensation statute was held unconstitutional; (see, Estabrook v. American Hoist and Derrick, Inc., 498 A.2d 741 (1985)), however, even if a lack of uniformity exists, this is not grounds to accept the petition for writ of certiorari. In Zucht v. King, this Court held ". . . it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the

writ, substantial in character. Sugarman v. United States, 249 U.S. 182, 184, 39 S.Ct. 191, 63 L.Ed. 550." 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922).

In Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932), this Court held that workers' compensation laws come within the valid exercise of state police powers by reason of a state's interest in the safety and well-being of its citizens. Pursuant to the State's vested police powers, the Georgia legislature passed the Georgia Workers' Compensation Act, creating an exclusive remedy for an employee injured on the job. Although the petitioners have identified a jurisdiction which propounds a different Workers' Compensation Act, this is not grounds to accept jurisdiction and

declare the subject statute unconstitutional.

In Massey v. Thiokol Chemical Corp., 368 F.Supp. 668 (S.D.Ga. 1973), the District Court addressed the variance of application of a particular workers' compensation act within the context of a constitutional challenge, holding as follows:

> Whether one state had adopted a fairer or more progressive formula than another state is neither here nor there; nor is what Congress may do in selecting a standard concept. The point is, as far as this case is concerned, that the problem addresses itself to the legislative and not the judicial branch. Inadequacy or

inequity of a system of compensating for death or disability does not mean that a formula is constitutionally infirm. Neither ideality nor uniformity is required. The Supreme Court said in Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is

not made with mathematical nicety or because in practice it results in some inequality.'

Massey, 368 F.Supp. at 675. Pursuant to its police power, the Georgia Legislature enacted workers' compensation legislation "to do away with common law rules governing actions by employees under the law of master and servant and to replace such antique system with one that provided absolute liability of the employer and fixed compensation for accidental injury or death. Massey, 368 F.Supp. at 672. According to Dandridge, supra, since there exists a "reasonable basis" for this classification, O.C.G.A. § 34-9-11 does not violate the Equal Protection Clause.

CONCLUSION

The petition for writ of certiorari should be denied for the two separate grounds presented herein by respondent. First, the petition should be denied since petitioners failed to timely raise the constitutional question at the trial level. Second, this Court should not accept jurisdiction of this matter since petitioners have not presented a constitutional question which is substantial in nature. For these alternate reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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